BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GORDON E. SHAFFER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,058,166
MATCOR METAL FABRICATION, INC.	)	
Respondent	)	
AND	)	
	)	
TWIN CITY FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the July 12, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Timothy A. Emerson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 11, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant alleges that on September 12, 2011, he sustained a work-related accident while employed by respondent. Respondent disputed the claim by asserting claimant failed to prove he sustained a personal injury arising out of and in the course of his employment. Respondent also contended claimant's alleged work-related accident was not the prevailing factor in causing claimant's injury and resulting medical condition. In his July 12, 2012, preliminary Order, ALJ Moore found:

> Claimant has failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with Respondent. Claimant has

failed to establish that the alleged accidental injury was the "prevailing factor" in causing the injury, medical condition, need for treatment, disability or impairment.[1]

The issue before the Board is:

Did claimant sustain a personal injury arising out of and in the course of his employment with respondent? Specifically, was claimant's accident the prevailing factor causing claimant's injuries and current need for medical treatment?[2]

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant was a forklift operator for respondent. On September 12, 2011, claimant was using the forklift to transport sheet metal and place it on a laser machine, but the sheet metal fell off the forklift. Claimant testified he and another employee, Adam, were told to pick up the sheet metal that fell off the forklift. They were also instructed to straighten up the sheet metal area, which claimant estimated to be 30 feet by 50 feet. Claimant testified of having to pick up dozens of pieces of sheet metal of varying sizes and shapes. Some of the pieces weighed hundreds of pounds. While picking up and straightening the sheet metal claimant felt a pull in his back and developed back discomfort, but was able to complete the task. As the workday continued claimant's back pain gradually worsened, but he finished the workday. That night claimant took non-prescription pain medication, but the pain further escalated.

It was claimant's intent to return to work the next day and work through his physical condition. Respondent called claimant before he came to work the next day and terminated him for spilling the sheet metal from the forklift. At that time claimant reported the work-related accident and was sent by respondent to Dr. Gregory H. Mears, an osteopathic physician. He prescribed medication and tried to adjust claimant's back. Claimant saw Dr. Mears twice but, thereafter, respondent refused to authorize further medical treatment.

Claimant testified he did not report the accident the same day it occurred because he was going to report it the next day when he returned to work. Instead, he was discharged for spilling the sheet metal. After reporting the accident, claimant completed an accident report for respondent. He admitted stating in the report there were no injuries

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[1] ALJ Order (July 12, 2012).

[2] Pursuant to K.S.A. 2011 Supp. 44-508(f), in order for an accident to be deemed arising out of employment, the accident must be the prevailing factor causing the injury, medical condition, and resulting disability or impairment. Therefore, prevailing factor is a necessary component of "arising out of."

as a result of the forklift accident. It was claimant's testimony that he thought the accident report was asking about the incident where he spilled the sheet metal, not about the back injury he suffered while moving the sheet metal pieces.

At the request of his attorney, on December 2, 2011, claimant was examined by orthopedic specialist Dr. Edward J. Prostic. Dr. Prostic's report indicated claimant had a history of back problems before working for respondent, but that claimant did not feel impaired by his back prior to his employment with respondent. X-rays were taken which revealed severe degenerative change at L4-5 with pseudo-spondylolisthesis and compression deformity of L1 with diffuse degenerative changes at the thoracolumbar junction area. Dr. Prostic indicated claimant could not return to gainful employment and that his work-related accident on September 12, 2011, was the prevailing factor causing the injuries and need for medical treatment.

Pursuant to an April 12, 2012, preliminary Order, ALJ Moore appointed Dr. David W. Hufford, an occupational and sports medicine physician, to independently evaluate claimant and to provide an opinion on diagnosis, recommendations for treatment, claimant's ability to work and, if so, appropriate work restrictions. The preliminary Order did not request that Dr. Hufford render an opinion on the causation of claimant's injuries.

Claimant was evaluated on May 22, 2012, by Dr. Hufford. The report erroneously lists claimant's date of accident as December 5, 2011. Dr. Hufford's report stated claimant previously sustained a low back injury in the remote past when he fell off a ladder. His report noted claimant retired as a police officer in 1999, following a fusion procedure on the right wrist.

Following his job as a police officer, claimant held several different jobs. Dr. Hufford's report indicated claimant had generalized osteoarthritis, which was problematic. The report stated claimant had been maintained chronically on Meloxicam and had been taking Gabapentin prescribed by his family physician for at least two years for generalized pain. Dr. Hufford's report indicated claimant was provided a TENS unit, which he uses episodically when able, for generalized aches and pains across the cervical, thoracic and lumbar spine. The report also noted that claimant's first job with respondent involved standing and walking the entire shift. In order to lessen his ongoing symptoms of mid and low back pain, claimant felt he was unable to do this job and requested a change in jobs to a forklift operator.

In a letter to ALJ Moore containing his report dated May 22, 2012, Dr. Hufford stated that in the joint letter provided to him he was expressly forbidden to render an opinion on causation. However, Dr. Hufford gave the following causation opinion:

> It is my opinion that almost 100% of his current symptomatology is due to his pre-existing degenerative lumbar disc disease and that were he considered at MMI at any point in the future his final impairment for the work-related component of his

> symptoms should take this into account. Stated differently, and in an attempt to avoid an analysis of causation as I have been forbidden to do, his pre-existing impairment due to the presence of the lumbar degenerative disc disease, use of medications including the pain modifying agent Gabapentin, pre-existing use of a TENS unit for diffuse myofascial symptoms across all 3 spinal levels, and requests to have his job classification reassigned shortly after beginning employment from duties that require standing and walking to the operation of a forklift to lessen his pain, it is readily apparent that there is a large component of pre-existing symptomatology which has been minimally impacted by the stated work activity of December 5, 2011.[3]

In his closing argument at the July 11, 2012, preliminary hearing, claimant's attorney stated that Dr. Hufford's report "should be discounted because we asked him specifically not to address causation"[4] and because he had the wrong date of accident in his report. However, claimant's attorney did not object to Dr. Hufford's report, nor request that ALJ Moore not consider Dr. Hufford's causation opinion.

Dr. Hufford recommended claimant undergo a lumbar MRI, a course of physical therapy and continue taking Meloxicam and Gabapentin. After receiving the letter from Dr. Hufford and without holding another preliminary hearing, ALJ Moore issued a June 4, 2012, Order stating that by June 15, 2012, respondent was to provide the names of two physicians, from which claimant could designate a treating physician. If respondent failed to do so, Dr. Hufford would be designated claimant's authorized treating physician.

Claimant's direct testimony at the July 11, 2012, preliminary hearing concerning his history of back problems differed somewhat from the history contained in Dr. Hufford's report to ALJ Moore. Claimant testified he last used the TENS unit in 2007. Nor had he sought medical treatment for the low back, thoracic spine or cervical spine in the five years before September 2011. He did acknowledge having, over a period of time, discomfort in the neck, thoracic spine and low back. Claimant testified the reason for the move from laser assistant to a forklift operator position was because of difficulties with his feet, not his back.

Upon cross-examination, claimant testified that he is only alleging a low back injury as a result of the September 12, 2011, accident. Claimant admitted that when he went to work for respondent he was taking Meloxicam and Gabapentin for the whole body, which was prescribed by his family physician, Dr. Hignight.

Patricia Ann Seitz, third shift production supervisor, testified for respondent. She was claimant's supervisor for 90 days but only when he was a forklift operator. It was her

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[3] Hufford Letter (May 22, 2012) at 3.

[4] P.H. Trans. at 73.

understanding claimant was moved to a forklift operator position because of his back. She learned from Adam, the co-worker who helped claimant move the sheet metal pieces, about the sheet metal spill. Adam told Ms. Seitz the sheet metal pieces weighed 32 pounds each, and that Adam lifted the spilled pieces onto the forklift operated by claimant. Ms. Seitz first became aware that claimant was alleging an accident two days after the sheet metal spill. She indicated claimant was discharged for safety violations and was discharged by respondent before she learned of the sheet metal spill.

ALJ Moore's findings are set out above.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[6]

As this claim is at the preliminary hearing stage, at issue is whether claimant's work accident is the prevailing factor causing his present need for medical treatment. K.S.A. 2011 Supp. 44-508(f)(2) states in part,

> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) defines prevailing as:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

This Board Member concurs with ALJ Moore's finding that claimant failed to prove his accident was the prevailing factor causing his injuries and current need for medical

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[5] K.S.A. 2011 Supp. 44-501b(c).

[6] K.S.A. 2011 Supp. 44-508(h).

treatment as required by K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii). Consequently, that also means claimant failed to prove he sustained a personal injury by accident arising out of his employment. Dr. Prostic opined claimant's work-related accident was the prevailing factor causing his injury and need for treatment. However, Dr. Prostic offered little explanation as to how or why he reached that opinion. Conversely, Dr. Hufford's unsolicited backdoor opinion on causation indicated that almost 100% of claimant's symptomatology was the result of his pre-existing degenerative lumbar disc disease. By claimant's own admission, he had been taking Meloxicam and Gabapentin for generalized aches and pains when he went to work for respondent. Respondent also presented evidence that claimant became a forklift operator because his former job with respondent was causing back pain.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

CONCLUSION

Claimant failed to prove by a preponderance of the evidence that his work accident is the prevailing factor causing his present need for medical treatment.

WHEREFORE, the undersigned Board Member affirms the July 12, 2012, Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

[7] K.S.A. 2011 Supp. 44-534a.

[8] K.S.A. 2011 Supp. 44-555c(k).

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Bruce E. Moore, Administrative Law Judge